PAZULI TAJUDIN

v.

PP

HIGH COURT MALAYA, TEMERLOH
RAMLY ALI JC
[CRIMINAL APPEAL NO: 41-16-2000]
9 JULY 2001

ROAD TRAFFIC: *Reckless driving - Causing death by reckless driving - Evidence - Evaluation of - Whether learned magistrate correct - Whether witnesses' evidence effectively challenged - Proof of - Obvious and serious risk to injury - Failure to consider possibility of obvious risk - Risk realised but nevertheless taken - Whether evidence sufficient to establish offence beyond reasonable doubt - Road Transport Act 1987, s. 41(1) - Whether proper to reduce or amend the charge under s. 43(1) Road Transport Act 1987*

ROAD TRAFFIC: *Reckless driving - Evidence - Report submitted by Puspakom officer - Road Transport Act 1987, s. 117 (5) - Failure to deliver copy of report to appellant within specified time - Whether relevant - Failure to cross examine contents of report - Issue only raised at trial end - Whether should have been raised at close of prosecution case - Whether reports were rightly tendered and admitted - Whether there are other evidence adduced by prosecution - Whether there was sufficient evidence to convict appellant under s. 41(1) Road Transport Act 1987*

CRIMINAL PROCEDURE: *Sentence - Traffic offences - Road Transport Act 1987, s. 41(1) - Causing death by reckless driving - Adequacy of sentence - Deterrent sentence - Disqualification - Whether sentence commensurate with and closely reflect the high degree of recklessness - Whether to take judicial notice of public interest*

The appellant was charged for an offence under s. 41(1) of the Road Transport Act 1987 (RTA) for causing death by reckless driving. He was convicted of the offence and was sentenced to two years imprisonment and three years disqualification from driving all class of vehicles. Hence, the appellant appealed against the said conviction and sentence.

The appellant's counsel argued that the learned magistrate was wrong in law and in fact when he found that the prosecution had established its case beyond a reasonable doubt against the appellant on these grounds: (1) in accepting and relying on the evidence of the eyewitnesses SP2 and SP8;

(2) in not holding that the deceased victim was not wearing safety helmet at the time of the accident thus contributing to his death; (3) in finding that the appellant was in the circumstances driving recklessly in causing the accident; (4) for failing to exercise his discretion to reduce the charge under s. 43 (1) RTA and (5) in accepting two inspection reports by Puspakom officer as to the damage on both vehicles involved in the accident (P8 and P9), contrary to s. 399 of the Criminal Procedure Code (CPC). The appellant also argued that the sentence imposed against him was too excessive.

Held:

[1] The learned magistrate had indicated that both SP2 and SP8 were independent witnesses and had no interest in the case. Their evidence had not been effectively challenged by the appellant. The learned magistrate had the advantage of seeing and observing both the witnesses while giving evidence in court. He had also carefully assessed their evidence and came to a conclusion that both of them (SP2 and SP8) were sincere and to be believed. In that premise and based on the consistency of their evidence, the learned magistrate was correct in accepting the evidence of SP2 and SP8 and it was not proper for this court, in exercising its appellate jurisdiction to interfere with the finding.

[2] Both SP2 and SP8 and the investigating officers (SP6) had testified that the victim was wearing a safety helmet at the time of the accident. The appellant's counsel had not challenged this evidence. He only raised this issue in his submission at the end of the trial and also during this appeal. That being the case, the trial magistrate had correctly admitted the evidence and held that the victim was wearing safety helmet at the time of the accident.

[3] The appellant's conduct in driving his motorlorry at the time of accident had shown a selfish disregard for the safety of the oncoming motorcyclist. The appellant had created an obvious and serious risk of injury to the motorcyclist and must either have given no thought to the possibility of that obvious risk, or have seen the risk but nevertheless decided to take it. The learned magistrate was correct when he concluded that the appellant in the circumstances was driving his motorlorry recklessly in causing the accident and thus causing the death of the motorcylist.

[4] The evidence adduced before the learned magistrate was sufficient to establish the offence beyond a reasonable doubt under s. 41(1) of the RTA 1987 as per charge. In the circumstances, it was not proper for him to reduce or to amend the charge under s. 43(1) of the same Act. There was no justification at all for the learned magistrate to exercise such powers.

[5] Puspakom officer is a person licensed under the RTA 1987 for the purpose of s. 117(5). Any report such as P8 and P9 (by that officer) shall be sufficient *prima facie* evidence of any fact as to the damage or extent of damage caused to both the vehicles involved in the accident. These provisions are also subject to the same proviso as contained in s. 399 CPC *ie* a copy of such certificate or report shall be delivered to the defendant not less than 10 clear days before the commencement of the trial. In this case, there was no indication that P8 and P9 had ever been delivered or served on the appellant within the prescribed time. But the prosecution had called the relevant officer (SP7) to give evidence in court and to tender the said P8 and P9. The appellant did not cross examine the officer (SP7) on the contents of the reports. In fact, the appellant's counsel raised this issue only at the end of the trial *ie* during his submission at the end of the defence, not even at the end of the prosecution case. If at all the appellant was serious in this issue it should have been raised when SP7 tendered the said P8 and P9 or at least at the close of the prosecution case. Thus, the learned magistrate was right in not accepting the counsel submission on that issue.

[6] Both the reports P8 and P9 were rightly tendered and admitted as evidence to corroborate the evidence of SP6 in court. Furthermore, there was other evidence adduced by the prosecution such as oral evidence of all the witnesses (SP2, SP6, SP7 and SP8); the sketch plan and the photographs showing the condition and the nature of the road. Even the evidence of the appellant (SD1) personally to some extent helped the prosecution's case. Thus, even without P8 and P9, there was sufficient evidence to convict the appellant under s. 41(1) of the RTA 1987.

[7] Public interest demands that a deterrent custodial sentence with a long period of disqualification from driving any vehicles on the road be meted out to the appellant, so that a necessary message could be conveyed to others. The three years' disqualification imposed by the trial magistrate would be sufficient enough to act as deterrent. The court is also satisfied that the sentence imposed by the trial magistrate

on the appellant is not excessive as it commensurate with and closely reflect the high degree of culpability and recklessness on the part of the appellant in causing the accident.

[Appeal dismissed; decision of learned magistrate in respect of conviction and sentence confirmed.]

Case(s) referred to:
Chong Peng v. PP [1954] MLJ 39 ***(refd)***
Chong Yik v. PP [1953] MLJ 72 ***(refd)***
Goh Tong v. PP [1953] MLJ 167 ***(refd)***
Hussaina Rani I/K Naina Mohamed (Suing as widow of Naina Mohamed, deceased) v. Ahmad Nadzri Kamaruddin & Anor [1997] 3 CLJ 500 ***(refd)***
Mohammed Hassan v. PP [1998] 2 CLJ 170 ***(refd)***
PP v. Zulkifli Omar [1998] 1 CLJ 1079 ***(refd)***
R v. Guilfoyle [1973] 2 All ER ***(refd)***
R v. Reid [1992] 3 All ER 673 ***(refd)***
Saw Thean Teik v. R [1953] MLJ 124 ***(refd)***
Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 ***(refd)***
Wong Kok Keong v. Regina [1955] 21 MLJ 13 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 158, 399(1), (2)(f), 427
Evidence Act 1950, s. 60(1)(d)
Road Transport Act 1987, ss. 41(1), (3), 43(1), 117(5)

For the appellant - Harvinder Kaur; M/s Gill & Harvinder
For the respondent - Yusaini Amir DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Ramly Ali JC:

The Appeal

The appellant was charged for an offence under s. 41(1) of the Road Transport Act 1987 (RTA), for causing death by reckless driving, at the Magistrate Court Bentong Pahang. At the end of the trial, he was convicted of the offence and was sentenced to two years imprisonment and three years disqualification from driving all class of vehicles. The appellant now is appealing against the said conviction as well as the sentence.

The Charge

In the lower court, the appellant was charged as follows:

Bahawa kamu pada 10.2.1995, jam lebih kurang 11.45 pagi di KM 390 Jalan Kota Bharu ke Kuala Lumpur, dalam daerah Bentong dalam Negeri Pahang Darulmakmur sebagai pemandu M/lori (T) WDG 315, telah memandu kenderaan tersebut di atas jalan raya awam telah didapati kamu memandu dengan cara melulu menyebabkan kematian kepada penunggang motosikal nombor CAL 8721 Chan Chee Keong KPT 711029-10-5385, umur 24 tahun. Oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 41(1) APJ 1987.

The prosecution had called eight witnesses (including two independent eyewitnesses SP2 and SP8). At the close of the prosecution case, the learned magistrate was satisfied that the prosecution had proved the case beyond a reasonable doubt under the offence charged, and defence was called. The defence had called only one witness ie, the appellant personally as SD1. At the end of the trial, the learned magistrate was satisfied that the defence had not cast any reasonable doubt to the prosecution's case and accordingly found that the prosecution had successfully established it's case beyond a reasonable doubt. Thus the appellant was found guilty and convicted under the offence charged.

The Grounds Of Appeal

On Conviction

The appellant's counsel argued that the learned magistrate was wrong in law and in fact when he found that the prosecution had established its case beyond a reasonable doubt against the appellant, on the grounds that:

i) the learned magistrate was wrong in accepting and relying on the evidence of the eyewitnesses SP2 and SP8 (first ground);

ii) the learned magistrate was wrong in not holding that the deceased victim was not wearing safety helmet at the time of the accident thus contributing to his death (second ground);

iii) the learned magistrate was wrong in finding that the appellant was in the circumstances driving recklessly in causing the accident (third ground);

iv) the learned magistrate was wrong for failing to exercise his discretion to reduce the charge under s. 43(1) RTA (fourth ground); and

v) the learned magistrate was wrong in accepting two inspection reports by Puspakom officer as to the damage on both the vehicles involved in the accident (P8 and P9), contrary to s. 399 of the Criminal Procedure Code (CPC) (fifth ground);

On Sentence

On the question of sentence, the appellant argued that the sentence imposed by the learned magistrate against him was too excessive and contended that the learned magistrate had failed to consider all the mitigating factors put forward by his counsel.

How The Accident Occurred

On that fateful day (10 February 1995) at about 11.45am, the appellant was driving a 41 feet long motorlorry (tanker) No. WDG 315 along Bentong –Raub trunk road, from the direction of Bentong towards Raub. While overtaking another motorcar (proceeding in the same direction) the appellants' motorlorry collided with an on coming motorcyclist head-on. The accident occurred on the motorcyclist's side of the road ie, on the right hand side as one faces the direction of Raub. As a result of the accident, the motorcyclist was pinned in between the tyres of the motorlorry and was dragged for a considerable distance. He died at the scene of the accident. According to the post-mortem report (P4) the cause of death was "MVA with severe head injury". The spot where the accident occurred was in between two bends – the first bend was very sharp about 300 meters away behind the motorlorry and the second bend was about the distance of "10-15 small cars" ahead of the motorlorry. The motorcar which was being overtaken by the appellants motorlorry at the time of the accident was driven by SP2, with SP8 as his passenger.

I shall now deal with the grounds raised by the appellant in this appeal

First Ground — The Evidence Of SP2 And SP8

At the material times, SP2 was driving a motorcar no: WU 4041 on the same direction as that of the motorlorry of the appellant. SP8 was a passenger in the said car, seated at the front passenger's seat besides SP2. He was driving at a speed of 60-70 km/j in front of the appellant's motorlorry. Just before the accident, both SP2 and SP8 noticed that the appellant's motorlorry was overtaking their motorcar and the accident occurred while the appellant's motorlorry was half-way in the process of overtaking their motorcar. In that position, they saw the motorcyclist was coming from the opposite direction after negotiating a bend and they saw how the accident occurred. Their view was not blocked by the motorlorry (as submitted by the appellant's counsel) because at that moment just before the accident the motorlorry was abreast to their car, while overtaking. After the accident, both SP2 and SP8 saw the motorlorry swerved into the left lane (as one faces Raub) and later stopped at the side

of the road. Both of them confirmed that the accident occurred on the motorcyclist's side of the road. In his grounds of decision the learned magistrate said:

> Keterangan kedua-dua saksi ini tidak dapat digugat oleh pihak pembelaan, Mahkamah juga mendapati keterangan mereka konsisten dan teratur. Saya juga telah menilai mereka dengan teliti dan berpuashati bahawa mereka merupakan saksi yang jujur dan boleh dipercayai. Selain itu mereka juga merupakan saksi yang berkecuali dan tiada apa-apa kepentingan di dalam kes ini. Fakta menunjukkan bahawa kenderaan SP2 tidak terlibat langsung dengan kemalangan ini.

This is a finding of fact by the learned magistrate. He has indicated that both SP2 and SP8 were independent witnesses and have no interest in the case. Their evidence have not been effectively challenged by the appellant. The learned magistrate has the advantage of seeing and observing both the witnesses while giving evidence in court. He has carefully assessed their evidence and came to a conclusion that both of them (SP2 and SP8) were sincere and to be believed. In that premise and based on the consistency of their evidence, the learned magistrate was right in accepting the evidence of SP2 and SP8 and it is not proper for this court, in exercising its appellate jurisdiction, to interfere with the finding. It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence, unless it can be satisfactory shown that the learned magistrate has so fundamentally misdirected himself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion; or unless it can be shown that the learned magistrate has failed to consider relevant considerations or has considered irrelevant considerations. (see: *Sivalingam a/l Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545 CA; and *Hussaina Rani I/K Naina Mohamed (Suing as widow of Naina Mohamed, deceased) v. Ahmad Nadzri Kamaruddin & Anor* [1997] 3 CLJ 500 CA).

Second Ground – The Victim Was Not Wearing Safety Helmet

The appellant's counsel submitted that the learned magistrate was wrong in not holding that the deceased victim was not wearing safety helmet at the time of the accident thus contributing to his death. The counsel contended that the prosecution had failed to produce the safety helmet as an exhibit. He further submitted that the death of the victim was not caused by the reckless driving of the appellant but because of the victim's own negligent conduct in not wearing safety helmet while riding motorcycle.

Against, this issue is actually a finding of fact by the learned magistrate. The same principle (as stated above) applies ie, this court will not interfere unless it can be shown that the learned magistrate has failed to consider relevant considerations or had considered irrelevant considerations. In his grounds of decision, the learned magistrate said:

> SP2 turut menyatakan bahawa mangsa ada memakai topikeledar ketika kejadian dan ini turut disahkan oleh pegawai penyiasat yang telah memberikan keterangan sebagai SP6. Ini sekaligus menolak pertikaian peguam yang mempersoalkan mengapa topikeledar tidak dikemukakan. Mahkamah berpendapat bahawa ketiadaan topikeledar ini tidak menjejaskan kes pendakwaan kerana saksi-saksi telahpun mengesahkan dalam keterangan mereka bahawa mangsa ada memakainya ketika kejadian. Tambahan pula perkara ini hanya ditimbulkan diperingkat penghujahan diakhir kes keseluruhannya.

I have scrutinised the notes of evidence and found that both SP2 and the investigating officers (SP6) had testified that the victim was wearing safety helmet at the time of the accident. The appellant's counsel has not challenged this evidence. He only raised this issue in his submission at the end of the trial and also during this appeal. That being the case, I am satisfied that the trial magistrate has correctly admitted the evidence and held that the victim was wearing safety helmet at the time of the accident. Thus, in my view this ground is without merit.

Third Ground – Reckless Driving In The Circumstances

The appellant was charged under s. 41(1) of the RTA 1987, which reads as follows:

> (1) Any person who, by the driving of a motor vehicle on a road recklessly or at a speed or in a manner which having regard to all the circumstances (including the nature, condition and size of the road, and the amount of traffic which is or might be expected to be on the road) is dangerous to the public, cause the death of any person shall be guilty of an offence and shall on conviction be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or both.

(However in 1999 *vide* P.U (A) 1065/1999, this provision was amended to enhance the penalty to: "punishment with imprisonment for a term of not less than two years and not more than ten years and to a fine of not less than five thousand ringgit and not more than twenty thousand ringgit").

Before the 1999 amendment, a person convicted under the section shall be disqualified for a period of not less than twelve months from the date of the conviction from holding or obtaining a driving licence as provided under s. 41(3). However, after the amendment, the disqualification period was enhanced to "not less than three years from the date of the conviction and, in the case of a second or subsequent conviction, be disqualified for a period of ten years from the date of the conviction".

In the present case the appellant was charged under the limb "causing death by reckless driving". The words "reckless driving" or "driving recklessly" are not defined in the RTA 1987. Thus, it is left to the court to interpret those words by having regard to the manner and other aspects of the accused's driving which constituted recklessness and the prevailing circumstances at the material time of the accident including the nature, condition, and size of the road, and the amount of the traffic which is or might be expected to be on the road.

In *R. v. Guilfoyle* [1973] 2 All ER, Lawton LJ in the English Court of Appeal had said:

> Cases of this kind (causing death by dangerous or reckless driving) fall into two broad categories: first, those in which the accident has arises through momentary inattention or misjudgment (herein after called the first category), and secondly those in which the accused has driven in a manner which has shown a selfish disregard for the safety of other road users or of his passengers, or with a degree of recklessness (hereinafter called the second category).

More recently, in 1992, the English House of Lords in *R v. Reid* [1992] 3 All ER 673 had redefined the scope of the words "driving recklessly". In that case, Lord Goff had this to say:

> On this approach, enlivened by examples, it is, I believe, relatively easy to understand Lord Diplock's encapsulation of the law in his specimen direction, which is to the effect that a jury should only convict a defendant of driving recklessly if they are sure of the following: (i) that he was in fact driving in such a manner as to create a serious risk of causing physical injury to some other person who might happen to be using the road, or doing substantial damage to property; and (ii) either (a) that he recognised that there was some risk of that kind involved, but nevertheless went on to take it; or (b) that, despite the fact that he was driving in such a manner, he did not even address his mind to the possibility of there being any such risk, and the risk was in fact obvious.

Locally, Vincent Ng J in *Public Prosecutor v. Zulkifli bin Omar* [1998] 1 CLJ 1079, in dealing with the same issue had said:

> To be guilty of the more serious category of the offence of reckless driving, the driver (defendant) must have created an obvious and serious risk of injury to the person or damage to property and must either have given no thought to the possibility of that obvious risk, or have seen the risk and nevertheless decided to run it.

In the present case the issue is whether there was sufficient evidence to support the learned magistrate's finding that the appellant was driving his motorlorry recklessly in causing the accident and the death of the victim motorcyclist, by taking into consideration the relevant principle laid down in the above cited authorities. Was there sufficient evidence to show that the appellant had driven his motorlorry in a manner which has shown a selfish disregard for the safety of other road user.

It is not disputed that the appellant's motorlorry is a big tanker, measuring 7ft. 10in. in width and 41ft. long (according to the appellant's own testimony). The appellant also admitted that he was very familiar with that stretch of the road between Bentong and Raub. He has been driving through the same stretch for 2 1/2 - 3 years prior to the accident. In fact he said: "saya tahu jalan itu dengan teliti". It is also not disputed the accident occurred about 300 meters after the appellant's motorlorry had passed through a sharp bend (according to SP6 – the investigating officer). It is also not disputed that the accident occurred at a distance about "10-15 small cars" from another bend ahead of the appellant's motorlorry (according to the appellant's own testimony).

As to the width of the road, the photographs taken and exhibited as P2, the sketch plan (P6) and testimony of SP2 clearly show that the tarred road is quite narrow ie, about 10ft. on each side (looking at the photograph P2 A & D). In that circumstances (including the nature, condition and size of the road), the appellant who was driving his motorlorry following SP2's car from behind at the speed of 60-70 km/j, decided to overtake SP2's car. The appellant admitted that at that speed (60-70 km/j) SP2 was driving his car "too slow". In doing so the whole of the appellant's motorlorry had encroached into right hand side of the road. Considering the width of the motorlorry (7ft. 10in.) and the size of the road (about 10ft, each side) and the gap between the motorlorry and SP2's car while overtaking, the learned magistrate was correct in finding that the motorlorry has occupied almost the whole of the right hand side of the tarred road while overtaking SP2's car, leaving no space for any on coming vehicle to squeeze through. The appellant should not have overtaken SP2's car at that time. While in

the process of the overtaking and his motorlorry was abreast to SP2's car, the appellant saw the motorcyclist coming from the opposite direction after negotiating a bend ahead of the appellant. At that time the motorcyclist was at a distance about "10-15 small cars" from the appellant's motorlorry. The accident could have been avoided if the appellant on seeing the on coming motorcyclist has slowed down, let SP2's motorcar to pass through and later returned to the left side of the road. But he did not do so, eventhough he had the chance to do it. In fact the appellant, in total disregard for the safety of the motorcyclist, chose to accelerate further to complete his 'overtaking' of SP2's motorcar, on seeing the motorcyclist coming. In his own testimony during examination-in-chief, the appellant said:

> Lori saya tidak dapat berhenti dengan mengejut kerana saya cuba melajukan kenderaan untuk mengelakkan kemalangan. Tujuan saya untuk masuk ke jalan asal. Saya tidak pasti kelajuan saya semasa kemalangan.

Based on the facts and the evidence adduced, I am of the view that the learned magistrate was right when he concluded that the appellant in the circumstances, was driving his motorlorry recklessly in causing the accident and thus causing the death of the motorcyclist. I am also satisfied that the appellant's conduct in driving his motorlorry at the time of the accident has shown a selfish disregard for the safety of the oncoming motorcyclist. The learned magistrate's grounds of decision clearly indicate that he has taken into consideration all the relevant factors in coming to his findings. The relevant part of his grounds are as follows:

> Keterangan yang dikemukakan menunjukkan bahawa tindakan OKT semasa memotong adalah satu tindakan yang bukan sahaja merbahaya malah pemanduannya adalah dengan cara melulu dan tidak bertimbangrasa. Gambar (ehx. P2a-l) menunjukkan saiz M/lori yang besar dan adalah tidak selamat baginya melakukan pemotongan dijalan tersebut yang bukan sahaja kecil malah juga berselekoh di hadapan. Pegawai penyiasat yang juga menyediakan rajah kasar (eks. P6) telah mengesahkan tentang keadaan jalan ini. Adalah sukar bagi seseorang yang datang dari arah hadapan seperti mangsa untuk melihat M/lori OKT datang kerana penglihatannya akan dilindungi oleh selekoh tersebut. Sebagai pemandu kenderaan yang lebih besar tanggungjawab yang lebih terletak pada bahu OKT dan beliau seharusnya tahu risiko yang diambil olehnya ketika melakukan memotongan apabila menghampiri selekoh. Walaupun sedar akan risiko ini OKT tetap terus melakukan pemotongan ini dan tindakan inilah yang dilihat oleh Mahkamah sebagai pemanduan secara melulu.

The learned magistrate was also right when he concluded that:

> Mahkamah juga berpendapat bahawa M/lori OKT dipandu pada kelajuan yang tinggi sebelum kemalangan. Ini adalah berpandukan pada keterangan SP2 yang menyatakan bahawa keretanya sedang dipandu pada kelajuan 60-70 km/j apabila dipotong oleh M/lori OKT. Ini bermakna bahawa M/lori OKT perlu dipandu lebih laju daripada kenderaan SP2 untuk membolehkan pemotongan dilaksanakan. Selain dari itu kesan brek yang panjang seperti yang dilukis di dalam P6 turut mengukuhkan pendapat ini.

In the premise, applying the principle laid down in *R v. Guilfoyle (supra)*; *R. v. Reid (supra*) and *PP v. Zulkifli Omar (supra)*, I have no hesitation to hold that the appellant in the present case "have created an obvious and serious risk of injury to the motorcyclist and must either have given no thought to the possibility of that obvious risk, or have seen the risk but nevertheless decided to take it." Thus the appellant's ground of appeal on this issue is baseless and without merit.

Fourth Ground – Discretion To Reduce The Charge

The appellant's counsel also submitted that the evidence adduced was insufficient to disclose an offence under s. 41(1) of the RTA 1987, but sufficient to disclose an offence under s. 43(1) of the same Act. Therefore, he submitted that the learned magistrate should have exercised his discretion to reduce the charge under s. 43(1) of the Act. Section 43(1) reads:

> (1) A person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road shall be guilty of an offence and shall on conviction be punished with a fine of not less than four thousand ringgit and not more than ten thousand ringgit and shall also be liable to imprisonment for a term not exceeding twelve months.
>
> (Before the 1999 amendment, the penalty provided for was: "a fine not exceeding two thousand ringgit or to imprisonment for a term not exceeding six months").

The penalty under s. 43(1) of the RTA 1987 is much lesser compared to the penalty under s. 41(1) of the same Act. The disqualification provision under s. 43(1) is only applicable for the second or subsequent conviction while under s. 41(1) the disqualification provision is mandatory, unless the court for special reasons think fit to order otherwise (before amendment by A 1065/1999).

The relevant provisions which empower the court to amend or alter the charge at any time before judgment is pronounced, is s. 158 of the CPC. Section 167 of the CPC, on the other hand, empowers the court to convict a person of an offence which he is shown to have committed although he was not charged with it, if it appears in evidence that he committed that offence. However, these powers are discretionary which need to be exercised judiciously. In the present case, there is no justification at all for the learned magistrate to exercise such powers. The evidence adduced before him was sufficient to establish the offence beyond a reasonable doubt under s. 41(1) of the RTA 1987 as per charge. In the circumstances, it is not proper for him to reduce or to amend the charge under s. 43(1) of the same Act.

Fifth Ground – Puspakom Reports

An officer from Puspakom was called to give evidence in court as SP7. She tendered her reports on the extent of damages to both the vehicles involved in the accident. The reports were marked as P8 and P9. The appellant's counsel contended that the reports (P8 and P9) should not have been accepted and relied upon by the learned magistrate because the prosecution has failed to serve the reports on the appellant ten days before the trial as required under s. 399 CPC. Section 399(1) CPC provides:

> (1) Any document purporting to be a report under the hand of any of the persons mentioned in subsection (2) upon any person, matter or thing examined or analysed by him or any document purporting to be a report under the hand of the Registrar of Criminals upon any matter or thing relating to finger impressions submitted to him for report may be given in evidence in any inquiry, trial or other proceeding under this Code unless that person or Registrar shall be required to attend as a witness –
>
> (a) by the Court; or
>
> (b) by the accused, in which case the accused shall give notice to the Public Prosecutor not less than three clear days before the commencement of the trial.
>
> Provided always that in any case in which the Public Prosecutor intends to give in evidence any such report he shall deliver a copy of it to the accused not less than ten clear days before the commencement of the trial.

In the first place, before I can invoke s. 399 CPC in this present case, we have to be certained that Puspakom Officer is listed under sub-s. (2) of s. 399 CPC, which provides:

(2) The following are persons to whom the provisions of this section apply:

(a) officers of the Institute for Medical Research;

(b) Government Medical Officers;

(c) chemists in the employment of any Government in Malaysia or of the Government of Singapore;

(d) any person appointed by the Minister by notification in the Gazette, to be a Document Examiner;

(e) Inspector of Weights and Measures appointed as such under any written law relating to weights and measures in force in Malaysia; and

(f) any person or class of persons to whom the Minister by notification in the Gazette declares that the provisions of this section shall apply.

The appellant's counsel has not touched on this issue in his submissions. He had not proved that Puspakom Officer was ever declared by the Minister under sub-s. (2)(f). On checking, I am satisfied that Puspakom Officer has never been so declared by the Minister. Thus, my conclusion is that s. 399 CPC does not apply to P8 and P9. However the matter does not end there. There are specific provisions on the same issue under s. 117(5) of the Road Transport Act 1987 (Act 333) (the RTA). The relevant provisions are as follows:

(5) When in any proceedings for an offence against this Act, any question arises as to the damage or extent of damage caused to a motor vehicle as a result of an accident or whether a motor vehicle does, or does not, comply with any provision of this Act relating to the construction, equipment or conditions of use of such motor vehicle, the certificate of a road transport officer or any person licensed under this Act that he has examined the motor vehicle and the result of such examination shall be admissible in evidence, and shall be sufficient *prima facie* evidence of any fact or opinion stated therein relating to the construction, equipment or conditions of use of such motor vehicle, and the officer or any person licensed under this Act may not be called for cross-examination on the certificate unless contrary evidence is given which appears to the court to be credible, or unless for any reason the court considers cross-examination to be necessary or desirable in the interest of justice:

> Provided that in any case in which the prosecution intends to give in evidence of any such certificate there shall be delivered to the defendant a copy thereof not less than ten clear days before the commencement of the trial.

Eventhough differently worded, in effect the said s. 117(5) of the RTA 1987 is the same with s. 399 CPC, except that it is specifically provided only for a report or certificate, issued by a road transport officer or any person licenced under the Act. So far there is no reported authority on this subsection yet. However, since the effect is the same with that of s. 399 CPC, I find that the authorities on s. 399 CPC may help in dealing with these provisions.

Puspakom officer is a person licenced under the RTA 1987 for the purpose of s. 117(5). Any report such as P8 and P9 (by that officer) shall be sufficient *prima facie* evidence of any fact as to the damage or extent of damage caused to both the vehicle involved in the accident. The maker of the report need not be called to testify in court unless contrary evidence is given which appears to the court to be credible, or unless for any reason the court considers cross-examination to be necessary or desirable in the interest of justice. However, these provisions are also subject to the same proviso as contained in s. 399 CPC ie, a copy of such certificate or report shall be delivered to the defendant not less than ten clear days before the commencement of the trial. In the present case, there is no indication that P8 and P9 had ever been delivered or served on the appellant within the prescribed time. But, the prosecution had called the relevant officer (SP7) to give evidence in court and to tender the said P8 and P9. The appellant did not cross-examine the officer (SP7) on the contents of the reports. In fact the appellant's counsel raised this issue only at the end of the trial ie, during his submission at the end of the defence, not even at the end of the prosecution case. If at all the appellant was serious in this issue it should have been raised when SP7 tendered the said P8 and P9 or at least at the close of the prosecution case. Thus, the learned magistrate was right in not accepting the counsel submission on that issue.

It is to be noted that, if not for s. 117(5) of the RTA 1987, a report made by any road transport officer or any person licenced under the Act (including Puspakom officer) shall not be admitted as evidence pursuant to s. 60(1)(d) of the Evidence Act 1950 (Act 56) which reads:

> (60(1) Oral evidence shall in all cases whatever be direct, that is to say –
>
> (d) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

Thus, s. 117(5) of the RTA must be looked upon as creating an exception to s. 60(1)(d) of the Evidence Act 1950. The effect of s. 117(5) of the RTA 1987 is to make certain documents evidence of the truth of their contents, which would otherwise not be evidence at all.

The maker of the reports (P8 and P9) was called to give evidence in court as SP7. There is nothing in s. 117(5) of the RTA 1987 to preclude the prosecution from calling the maker of the reports to give oral evidence as well as to tender his reports in court, instead of relying on the reports as substantive evidence. The section merely enables the report to be used but does not make it obligatory for the prosecution to make the report substantive evidence. In *Mohammed bin Hassan v. PP* [1998] 2 CLJ 170, in dealing with s. 399 of the CPC, the Federal Court held:

> In point of law, where a maker of a report is called as a witness, there is nothing to prevent him from tendering his report for the purpose of corroborating his own evidence.

In the same case, (above) Chong Siew Fai CJ (Sabah & Sarawak) said:

> In fact, the prosecution called PW3, the maker of the report; by so doing, the prosecution not only had complied with the best evidence rule – the rule that the best evidence of which the subject (or the nature of thing) is capable ought to be produced – but had also afforded the appellant the benefit of cross-examining PW3, an opportunity of which erstwhile counsel for the appellant had indeed availed himself in this case.

In *Saw Thean Teik v. R* [1953] MLJ 124, Spencer Wilkinson J said:

> when a Medical Officer is giving oral evidence then, of course, any notes which he may have made at the time of his examination, he can refer to refresh his memory. Moreover, if his report is made at about the time when his examination took place, the report could be put in, not as primary evidence of its contents but to corroborate the oral evidence already given under section 157 of the Evidence Ordinance.

At p. 15, he went on to say:

> Clearly if the witness is in the witness box, the best evidence is his oral evidence as to what he saw or discovered (see: s. 60 of the Evidence Ordinance). Where witnesses of this kind are brought to Court, their reports should only be used, if at all, either to refresh memory or as corroboration.

So, in the present case, I am of the view that both the reports P8 and P9 were rightly tendered and admitted as evidence to corroborate the evidence of SP6 in court.

Assuming both P8 and P9 were held to be inadmissible and rejected by the learned magistrate, the question is whether without those two reports the prosecution has proved it's case beyond a reasonable doubt by using other evidence, to sustain conviction under the offence charged against the appellant. If there was no other evidence sufficient to support the conviction, then the appellant must be acquitted and discharged. However, on the other hand, if there was sufficient evidence (other than P8 and P9), then the conviction must be upheld. This principle was applied in *Chong Yik v. PP* [1953] MLJ 72; *Goh Tong v. PP* [1953] MLJ 167; *Chong Peng v. PP* [1954] MLJ 39 and *Wong Kok Keong v. Regina* [1955] 21 MLJ 13.

In *Wong Kok Keong v. Regina (supra*), which dealt with s. 427 of the Criminal Procedure Code (Cap 21) which was in *pari materia* with s. 399 of our present CPC, Spencer Wilkinson J *inter alia*, held:

> the improper admission of evidence will have no effect unless it has occasioned a failure of justice; the test as to whether or not a judgment of the Court below should be reversed or altered on account of wrongful admission of a certificate is whether or not without that evidence there was sufficient evidence to justify the conviction; if a certificate which ought not to have been admitted is admitted and there is no other evidence to prove the facts stated in the certificate then, if the accused is convicted, there has been a miscarriage of justice.

In the present case the appellant was charged under s. 41(1) of the RTA 1987 ie, causing death by reckless driving. The reports P8 and P9 were meant to show the damage and the extent of the damage to both vehicles involved in the said accident. In criminal proceeding, the issue about the damage and the extent of the damage to the vehicles involved, will assist the prosecution and the court to determine or to make inference as to how the accident occurred. This in turn will assist the prosecution to prove the charge against the accused person. If there are other evidence to prove the charge against the appellant, then the conviction must be upheld. The strength of each case depends on the facts and evidence available. In the present case, I am satisfied that there are other evidence adduced by the prosecution such as oral evidence of all the witnesses (particularly SP2, SP6, SP7 and SP8); the sketch-plan and the photographs showing the condition and the nature of the road. Even the evidence of the appellant (SD1) personally to some extent helped the prosecution's case. Thus my conclusion is that even without P8 and P9, there was sufficient evidence to convict the appellant under s. 41(1) of the RTA 1987.

On Sentence

The appellant was sentenced to (2) years imprisonment and was disqualified from driving (all class of vehicles) for (3) years. The appellant is saying that the sentence was "too excessive".

The penalty provided under s. 41(1) of the RTA 1987 (before amendment A 1065/1999), which is applicable in this case, is "a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or to both". The penalty was enhanced *vide* amendment A 1065/1999 "with imprisonment for a term of not less than two years and not more than ten years and to a fine of not less than five thousand ringgit and not more than 20 thousand ringgit". The fact that Parliament had enhanced the penalty provided under the section shows that the offence is a serious offence. The appellant was lucky because he was sentenced under the old penalty. The sentence imposed must commensurate with the high degree of culpability and recklessness on the part of the appellant. An innocent life has been taken away by his recklessness. The appellant should not be allowed to drive any vehicle on the road. The three years disqualification imposed by the trial magistrate would be sufficient enough to act as deterrent. I fully endorsed the views of Vincent Ng J in *PP v. Zulkifli Omar (supra)* on this issue when he said:

> In the current appeal this court must not wear blinkers and fail to take into account the new realities on road use and behaviour in our country – all the more so as such realities are backed up by hard facts and figures. According to a report by the Economic and Social Commission of Asia Pacific (ESCAP), Malaysia has the third highest accident rate in the world and the highest accident fatalities in the world – indeed, for five consecutive years from 1992 to 1996 – with a fatality rate of 8.28 for every 10,000 cars on the road as compared to Finland's 1.80 for every 10,000 cars.

In the present case the appellant was driving a heavy-vehicle while the victim was just a mere motorcyclist. His reckless driving had caused the death of the motorcyclist. Public interest demands that a deterrent custodial sentence with a long period of disqualification from driving any vehicles on the road be meted out to the appellant, so that a necessary message could be conveyed to be conveyed to others. In *PP v. Zulkifli Omar (supra)* the same judge had this to say:

> Recently, there has been an increasing phenomenon of callous and culpably reckless heavy-vehicle drivers on our roads. It is my view that the cynical disregard for the safety of other road users by heavy-vehicle drivers, often observed on our roads, may perhaps stem from the thought that they do not (normally) own the vehicles they drive, and that by virtue of the weight and size of their vehicles, the injuries they may sustain should they be

> involved in any awful road carnage, would be far less severe than occupants of other lighter vehicles – often not so much as a broken toe or leg. Consequently, in the public interest, where the facts warrant, the courts ought not hesitate to mete out robust and deterrent custodial sentence against such drivers. And, in the present case, the sentence must commensurate with and closely reflect the high degree of culpability and recklessness on the part of the defendant, as aggravated by the magnitude of the carnage that he caused by his rash act.

I fully endorsed the above view. In the present case, I am satisfied that the sentence imposed by the trial magistrate on the appellant is not excessive. It commensurate with and closely reflects the high degree of recklessness on the part of the appellant in causing the accident. The learned magistrate has taken into consideration all the relevant factors before passing the said sentence on the appellant.

Conclusion

For the above reasons, the appeal is dismissed and the decision of the learned magistrate in respect of conviction and sentence is confirmed.